

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-499

EASTMAN KODAK COMPANY,

Petitioner,

v.

BERKEY PHOTO, INC.,

Respondent.

**BRIEF FOR RESPONDENT ON THE CROSS-PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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In the Petition for a Writ of Certiorari filed on behalf of Berkey Photo, Inc. ("Berkey") in No. 79-427, presently pending before this Court, Berkey prays for review of a judgment and opinion entered in this cause on June 25, 1979 by the United States Court of Appeals for the Second Circuit. The instant brief is submitted in response to Eastman Kodak Company's ("Kodak") Cross-Petition for a Writ of Certiorari seeking review of the same judgment and opinion.

Questions Presented

In its petition in 79-427, Berkey urged, and we submit demonstrated, the urgent need for Supreme Court review

of this case to resolve critically important questions of interpretation of Section 2 of the Sherman Act. The formulation of issues and more detailed statement of the case there presented will not here be repeated, but is relied upon to acquaint the Court with the relevant context of the matter. In responding to the instant cross-petition, we do not gainsay the importance of the issues raised in either petition, but emphasize that the Court of Appeals and both parties have manifested a recognition of the new, important and complex issues under Section 2 of the Sherman Act which are here involved. We do, however, contend that Kodak's cross-petition does not accurately focus on the applicable facts and law. On the record herein, the questions presented by the cross-petition are:

1. In an action by a direct purchaser which was overcharged during the statute of limitations period¹ by a persistent monopolist, may a jury consider conduct by the monopolist prior to the limitations period where, as was here held by the Court of Appeals, the quantum of the overcharge must be specifically related to culpable conduct tending to create or maintain the monopoly?

2. Is wrongful use or "leveraging" of monopoly power to gain competitive advantage in a related market a violation of Section 2 of the Sherman Act without an additional violation of monopolization or attempt to monopolize in the related market?

Counterstatement

a. The Overcharge Claims

Berkey's claim for treble damages as an overcharged direct purchaser of amateur conventional film and color

¹ The complaint herein was filed on January 29, 1973. Accordingly, the limitations period here referred to is from and after January 29, 1969.

paper was based on, *inter alia*, proof that Kodak had, during the limitations period, violated Section 2 of the Sherman Act by monopolizing the relevant markets for such film and paper. The jury awarded single damages to Berkey of \$11,500,000 for film overcharges and \$8,803,000 for paper overcharges within the limitations period (188a).² The District Judge upheld the award of damages for film overcharges (127a-28a) but set aside the award in the paper market, concluding that there was not "the required proof of exclusionary or anticompetitive conduct" (133a). The District Judge had ruled that evidence of Kodak's exclusionary conduct prior to the limitations period was not to be considered in deciding if Kodak's monopoly during the statutory period was created or maintained in any part by such earlier conduct, or in quantifying the damages.³

The Court of Appeals did not specifically comment upon the adequacy of the proof of exclusionary conduct during the limitations period with respect to either the film or

² Roughly 15% of the purchase price paid by Berkey to Kodak and reflecting a still extravagant profit rate for Kodak on those sales. (See Petition in 79-427, nn. 8, 45.)

³ Kodak inaccurately contends (Cross-Petition, pp. 3-4) that Berkey relied solely on Kodak product introductions as the anti-competitive conduct by which Kodak secured and maintained its monopoly power in these markets. The proof demonstrated a variety of exclusionary practices, some of which were associated with product introductions. (See 128a, where the District Court referred to certain exclusionary practices in film, clearly labeled as illustrations, and which are not limited in the manner Kodak describes; see 134a regarding paper). Moreover, as a matter of law, Section 2 is violated by a showing of monopolization by means of conduct which is exclusionary or anticompetitive even though not independently unlawful. Kodak's contention (Cross-Petition, p. 3) that the District Court limited liability to "unlawful conduct" is thus untenable and flouts the opinions of the District Court (see, *e.g.*, 105a-06a, 126a-28a).

paper markets (see Petition in 79-427, pp. 7, 19). It remanded, however, for further proceedings, because it found that an erroneous measure of damages had been employed in the District Court.⁴ The Court also reversed the District Judge and ruled that, on remand, Berkey should also be permitted to rely on conduct antedating the statutory period creating or maintaining the monopoly, and attempt to relate such conduct to the violation and injuries during the limitations period for which damages are claimed in both the film and paper markets (75a). Accordingly, based on rulings by the Court of Appeals, which are the subject of petitions for certiorari by both sides, the proceedings on remand will involve the arduous and complex review of conduct by Kodak over 60 years or more and an effort to relate such conduct to price increments since 1969. (See also Petition in 79-427, p. 35 and n. 47). Significantly, the original trial of this action took over eight months even though limited to testing events since 1969.

b. The Leveraging Claims

The jury specifically found that Kodak had misused its monopoly power in the film market to gain competitive advantage and injure Berkey in the photofinishing market where both competed (183a), *i.e.*, leveraged its film monopoly into the photofinishing market.⁵ The jury also found that Berkey had not proven that Kodak had attempted to monopolize the latter market (184a). Single damages were awarded to Berkey for lost profits as a photofinisher (\$55,700) and for overcharges on photo-

⁴ The petition in 79-427 seeks review of the Court of Appeals' conclusions on the manner of proving damages, which articulated what was recognized to be an unprecedented requirement that particular anticompetitive acts over a long period of time must be related to Kodak price increments during the limitations periods.

⁵ Leveraging into other markets was also there found.

finishing equipment bought from Kodak (\$19,000) (188a-89a). The District Court and Court of Appeals concluded that a Section 2 violation could be found when a company misuses its monopoly power in a relevant market, to gain competitive advantage over those with which it competes in a related market, even when it has not separately monopolized or attempted to monopolize the related market (22a-25a, 121a-22a). The Court of Appeals, however, remanded this claim for further proceedings to determine whether the elements of the offense there described had been proven (60a-61a), without clarifying how the retrial of this claim was to differ from the original trial (see also Petition in 79-427, pp. 16-17).

ARGUMENT

I. The Unusual Circumstance of Both Sides Seeking Certiorari to Review the Same Judgment and Opinion Confirms the Need for Early Supreme Court Review of Questions Which Are Fundamental to Further Conduct of This Case.

The opinion of the Court of Appeals repeatedly noted the importance and novelty of the issues involved in this case (*e.g.*, 5a, 7a). Berkey's petition in 79-427 confirmed those observations and sought review of several matters decided adversely to Berkey's claims. In its cross-petition, Kodak argues that the Court of Appeals erroneously decided other important questions which have obvious and immediate implications for Section 2 litigation generally. Manifestly, such unanimity should strongly militate in favor of review by this Court of questions whose importance for Section 2 jurisprudence is beyond doubt. Moreover, the initial question raised by Kodak's cross-petition is inextricably intertwined with issues which, as was demonstrated in the petition in 79-427 and nowhere

contravened, have not previously been addressed in a suit for overcharges by a monopolist (see Petition in 79-427, pp. 34-35).

Rulings which are the subject of both petitions are based on reversals of determinations made by the District Judge during the course of an eight-month trial and extensive post-trial proceedings. The retrial, involving conduct over so much longer time and elusive hypothetical economic relationships, could well take even longer. If the District Court's original rulings were correct, all of this is avoidable. If the Court of Appeals has erred (the District Judge and both parties obviously believe that it did), these extended proceedings would be a cruel waste of judicial effort and the resources of the litigants. Accordingly, Kodak's suggestion (Cross-Petition, p. 5) that this Court deny review of the issues which are fundamental to the further conduct of the case because of an alleged lack of finality, invites wasteful and extensive proceedings on matters which can now be reviewed by this Court on a record which was compiled after a full and complete trial. Moreover, Kodak's cross-petition also involves Section 2 issues which are closely related to those which are presented for review in connection with Berkey's camera claims, as to which no further proceedings have been directed.⁶ (See also Berkey's Reply Brief in 79-427, demonstrating that the lack of utter finality relied on by Kodak does not preclude review.)

⁶ Illustratively, Kodak urges, in opposing certiorari in 79-427, that determinations made in connection with cameras, which are questioned in that petition, are controlling with respect to the film and paper claims. (See Berkey's Reply Brief in 79-427, further demonstrating the inappropriateness and likelihood of waste inherent in the conduct of a further trial without review by this Court.)

II. The Cross-Petition Has Not Demonstrated That the Court of Appeals Erroneously Decided the Issues Which Kodak Presents for Review.

Kodak urges that the conclusion reached by the Court of Appeals on the relevance of pre-statute of limitations conduct is at variance with applicable precedent and statutory authority (Cross-Petition, pp. 5-8). We strongly disagree and submit that this aspect of the opinion below is supported by several decisions of this Court.⁷ Moreover, as the Court of Appeals observed (69a), a contrary result would be erroneous as a matter of policy since it would grant illegal monopolists a wholly inappropriate immunity from suit for overcharges.

Recognizing, however, the importance of the question, which had originally been resolved by the District Judge contrary to the more recent conclusion by the Court of Appeals, and that this question is inextricably intertwined with issues raised in the petition in 79-427, we urge that the matter be resolved with certainty before the parties undertake a further trial which would involve extensive evidence of pre-limitations period conduct.

Kodak's contention (Cross-Petition, pp. 8-9) that it did not violate Section 2 of the Sherman Act by misusing, or leveraging, its film monopoly to gain advantages over its competitors in the photofinishing and other markets is not well-founded. Kodak cites no case which suggests that such leveraging is lawful in the absence of the separate offense of monopolization or attempt to monopolize in the related market. A variety of precedents support the re-

⁷ E.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-40 (1971); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n. 15 (1968); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 709-10 (1962).

sult reached by the Court of Appeals.⁸ If there were, however, any doubt about the issue it should be resolved before a retrial, particularly in view of the lack of clarity on the standards applicable to further proceedings (see Berkey's Reply Brief in 79-427, pp. 7-8).

Conclusion

In a case of such wide interest and great moment, the Court of Appeals reached what it described as novel results on undecided questions in reversing so substantially the legal conclusions of the District Court. Both sides have filed petitions for certiorari. We submit that it is in the national interest, the interests of most effective use of precious judicial resources and the interests of the parties to this and other pending Section 2 cases, to grant certiorari and resolve the important questions here involved without wasteful delay or further proceedings.

Respectfully submitted,

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⁸ *E.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Griffith*, 334 U.S. 100 (1948); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *United States v. Aluminum Co. of America*, 148 F.2d 416, 438 (2d Cir. 1945).

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